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October 2, 1998

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VIA HAND DELIVERY
Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

Re: Ex Parte Presentation
DBS Public Service Obligations
(MM Docket No. 93-25)

Dear Ms. Salas:

In accordance with Section 1.1206 of the Commission's Rules, transmitted herewith on behalf of the United States Satellite Broadcasting Company, Inc. ("USSB") are two (2) copies of an ex parte letter that is being submitted simultaneously to Regina Keeney, Chief, International Bureau, regarding the construction of the terms "editorial control" and "channel capacity" as used in Section 25(b) of the 1992 Cable Act.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions, please contact the undersigned.

Very truly yours,

Marvin Rosenberg
Counsel for United States Satellite
Broadcasting Company, Inc.

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Enclosure

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October 2, 1998

Regina Keeney, Esq.
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Re: *Ex Parte* Presentation
DBS Public Service Obligations
(MM Docket No. 93-25)

Dear Ms. Keeney:

The United States Satellite Broadcasting Company, Inc. ("USSB"), pursuant to Section 1.1206 of the Commission's Rules and the above-referenced proceeding, hereby submits its construction of the terms "editorial control" and "channel capacity" as used in Section 25(b) of the 1992 Cable Act.

I. INTRODUCTION.

Section 25(b) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") requires direct broadcast satellite ("DBS") providers to reserve 4-7 percent of their channel capacity for noncommercial programming of an educational or informational nature. 47 U.S.C. § 335(b). This section also prohibits DBS providers from exercising any "editorial control" over such programming. Given the pro-competitive purpose of the 1992 Cable Act, the term "editorial control" means only that DBS providers may not edit or censor material within noncommercial programs provided pursuant to Section 25(b), but it does not limit the DBS provider's right to select the programming best suited to meet the needs and interests of the subscribers to the particular DBS service. Any interpretation to the contrary would not meet the statute's purpose. In addition, this construction of the term "editorial control" is consistent with the sole and limited purpose of Section 25(b) -- to require DBS providers to provide a minimum level of educational programming. Further, no valid regulatory purpose exists to justify a broader interpretation of the term "editorial control." Finally, in order to afford DBS providers the certainty needed to make business plans and the flexibility needed to accommodate future advances in technology, the term "channel capacity," as used in Section 25(b), should mean no more than 4 percent of the DBS provider's total available "video channels offered to the public." And in the case of small DBS providers with less than 50 channels, those providers should

provide a maximum of 2 channels and the second channel would not become operational until the provider has 44 operational channels. Moreover, where a particular provider's limited (less than 11 frequencies) channel assignments are split between more than one orbital location in the east (*i.e.*, 61.5, 101, 110 and 119) or in the west (*i.e.*, 148, 157, 166 and 175), the obligation shall be applicable to the whole and may be met at any of the eastern or the western locations.

II. THE MEANING OF "EDITORIAL CONTROL" IN SECTION 25(b).

A. Consistent with the Pro-competitive Purpose of the 1992 Cable Act "Editorial Control" Means Only that the DBS Provider May Not Edit or Censor Programming Aired on the Reserved Channels.

A principal goal of the 1992 Cable Act is to encourage competition with cable from alternative and new technologies, including wireless cable, DBS, and satellite master antenna television. H.R. REP. NO. 628, 102d Cong., 2d Sess. (1992) at LEXIS pp. 42, 58. Of the alternative multichannel video technologies, the House Report concludes that DBS may have the greatest potential for providing competition to cable. *Id.* at LEXIS p. 61. Given the pro-competitive backdrop in which the 1992 Cable Act was enacted, the term "editorial control" as used in Section 25(b) must mean only that DBS providers may not edit or censor the noncommercial programs that they choose to air pursuant to Section 25(b). Correspondingly, "editorial control" cannot mean, as some have suggested, that DBS providers may not select the noncommercial programming sources for the reserved channels. Such an interpretation would seriously undermine the ability of DBS providers to compete with cable.

USSB has gathered demographic data about its subscribers and, therefore, it is in the best position to determine the public service programming which will be best suited to its subscribers. Other DBS providers have similar information with regard to their subscribers. DBS providers must be able to and, indeed, are in the best position to, select the noncommercial programs that will best complement the existing programs in their particular programming packages and these noncommercial programs must be designed to enhance the value of the DBS provider's programming and be meaningful to each DBS provider's subscribers. If DBS providers are forced to air noncommercial programs that are not of interest to their customer base, then they will not be meeting the needs and interests of their subscribers, which will also inhibit the effective marketing of their programming packages. Further, this lack of "editorial control" over the selection of programmers would impede DBS's ability to compete with cable. Accordingly, any definition of "editorial control" which would prevent DBS providers from selecting the noncommercial programmers would only fail to serve subscribers and exacerbate the difficult competitive environment that DBS providers already face with entrenched cable systems.

In addition, the Commission need not be concerned that DBS providers will use the reserved channels for anything other than significant, meaningful programming to further their pro-competitive purposes. The strict first-come, first-serve procedures for the cable "leased

access" rules were adopted to curb cable's market power abuses and increase diversity in cable programming sources. H.R. REP. NO. 102-92 at LEXIS pp. 54-55; S. REP. NO. 92, 102d Cong., 2d Sess. 32 (1992). The legislative history of the 1992 Cable Act reveals that Congress was concerned that "some cable operators may have established unreasonable terms or may have had anticompetitive motives for refusing to lease channel capacity to potential leased access users, especially when the cable operator has a financial interest in the programming services carried." *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267, 5269-70 (1997) (cable leased access proceeding), *citing* H.R. REP. NO. 102-92 at 39, *see also* S. REP. NO. 102-92 at 32 ("the leased access provision is an important safety valve for anticompetitive practices").

In contrast, unlike cable which has market power and, in most markets, monopoly power, DBS is a fledgling industry which lacks market power. Further, DBS providers compete with each other for market share unlike cable systems which, with rare exception, do not compete against each other. Consequently, DBS providers have every incentive to innovate and diversify their program offerings by using diverse programming sources in order to increase viewership and market share which, in turn, provides a greater variety of public service programming to DBS subscribers. Further, drawing upon diverse programming sources will enable DBS providers to assemble the kind of new and innovative programming packages that their subscribers demand. Employing diverse programming sources will also help a DBS provider distinguish its product from that of other DBS providers and of cable operators, and diverse programming sources are a necessary and integral part of the DBS provider's programming package offerings. The greater the choice of program offerings, the greater is the ability of DBS providers to attract new subscribers and retain current subscribers. In short, DBS providers must be able to draw upon diverse programming sources, particularly in order to compete with dominant cable. Thus, by economic necessity, DBS providers will use diverse programming sources to produce noncommercial programs for the reserved channels. Accordingly, the Commission should not, because it need not, impose cable-like leased access rules on DBS providers.

B. The Assertion that the Term "Editorial Control" as Used in Section 25(b) and Section 612 of the 1992 Cable Act Must Be Similarly Construed Ignores the Different Purposes Served by Each Section and the Dissimilar Media to Which They Apply.

Some parties have argued that the term "editorial control" as used in Section 25(b) and Section 612 (the cable "leased access" provisions) must be similarly construed. They are mistaken. Under the *in pari materia* doctrine, statutory provisions should be construed together only if they relate to the same subject or object. Here, beyond the generality that Section 25(b) and Section 612 impose carriage obligations, the two sections serve very different purposes and apply to different media. In this circumstance, under *Chevron*, it is permissible for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837

(1984). For example, in *Common Cause v. Federal Election Commission*, 842 F.2d 436, 441-442 (1988), the court upheld two different interpretations of the term "name" in two separate sections of the Federal Election Campaign Act where the FEC provided a reasonable explanation of the sections' different purposes. *See also, National Ass'n of Casualty and Surety Agents v. Board of Governors of the Fed. Reserve Sys.*, 856 F.2d 282, 287 (D.C. Cir. 1988) (upholding different agency interpretation of same phrase when based on reasonable explanation), *cert. denied*, 490 U.S. 1090 (1989); *Comite Pro Rescate v. Sewer Auth.*, 888 F.2d 180, 187 (1st Cir. 1989) (same), *cert. denied*, 494 U.S. 1029 (1990).

Section 25(b) and Section 612 serve quite distinct purposes in program access regulation. Section 612 compels cable operators to make certain channels available to programmers unaffiliated with the operator on a first-come, first-serve basis. The purpose of Section 612 is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public." 47 U.S.C. § 532(a). Congress was concerned that cable operators do not necessarily have an incentive to provide a diversity of programming sources. Congress worried that cable operators might deny access to programmers if the operators disapproved the programmers' social or political viewpoint, or if the programmers' offerings competed with a program service already being provided by that cable system. H.R. REP. NO. 934, 98th Cong., 2d Sess. 48 (1984); *see also*, H.R. REP. NO. 102-628 at 39; S. REP. NO. 102-92 at 32.

In furtherance of the market-balancing and diversity purposes, Section 612 provides that a cable operator "shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming." 47 U.S.C. § 532(c). Recognizing that the leased access provisions prohibit cable operators from selecting, rejecting or editing programming to be aired on the reserved channels, the 1992 Cable Act insulates cable operators from criminal or civil liability for programs broadcast on those channels. 47 U.S.C. § 558.

In contrast, the sole purpose of Section 25(b) is to require "[DBS] providers to provide a minimum level of educational programming." H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 100 (1992). There is nothing in the legislative history that indicates that Congress was concerned that DBS providers would fail to employ diverse programming sources. H.R. CONF. REP. NO. 102-862 at 99-100; S. REP. NO. 102-92 at 91-92. Presumably, Congress recognized that unlike cable which has significant market power, DBS has no market power. Consequently, DBS providers have every incentive to innovate and diversify their program offerings by using diverse programming sources in order to increase viewership and market share. Unlike cable operators who are normally monopolies in their markets, DBS providers compete against each other as well as against cable. DirecTv, EchoStar and USSB are three separate voices. Because DBS operates in a competitive environment, Congress could rely on the marketplace to ensure that DBS providers would draw upon diverse sources of programming.

Moreover, the statutory language of Section 25(b) differs from the language in Section 612 in several important respects. For purposes of statutory construction, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). First, Section 25(b) requires that the reserved channels be used "exclusively for noncommercial programming of an educational and information nature." DBS providers, therefore, must necessarily select which programs and programming sources qualify for the reserved channels. Second, Section 25(b) does not contain the additional restrictive clause found in Section 612. While both sections state that the relevant provider "shall not exercise any editorial control over any video programming provided," only Section 612 contains the provision "or in any other way consider the content of such programming." As just mentioned, Section 25(b), by its terms, requires the DBS provider to consider the content of the programming. Finally, unlike Section 612, Section 25(b) does not contain a content immunity provision. Accordingly, Congress must have intended to give DBS providers the discretion to select or reject programs to be aired on the reserved channels.

In short, Section 25(b) and Section 612 serve very different purposes and, consequently, each section may support a different interpretation of the term "editorial control."

In addition to the different purposes served by the two sections, Section 25(b) and Section 612 apply to different media. Therefore, the meaning of the term "editorial control" developed in the cable context is not instructive here. In the sensitive area of restrictions on speech, the Commission should not simply transfer and apply literally interpretations of a term developed in another context. *See e.g., Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 739-742 (1996) (categorical approaches comparing common carriers and bookstores to cable are necessarily flawed); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 117-18 (1973) (the government's role with regard to television is different than with newspapers). DBS is a new and emerging media, whose capabilities and limitations are still in the early phases of development. Whereas cable will be celebrating its 50th anniversary this year, DBS is only in its fourth year of operation. Accordingly, the Commission should not import interpretations of the term "editorial control" developed in the very different context of cable (or even television or newspaper) to the new and evolving environment of DBS.

In sum, because the two sections have distinct purposes and apply to different media, the Commission may interpret the term "editorial control" differently in Section 25(b) and Section 612. Accordingly, consistent with its limited purpose of providing a minimum level of educational programming, as used in Section 25(b), "editorial control" must mean only that DBS providers may not edit or censor programs provided pursuant to that section, but does not limit the DBS provider's right to select the programming to be aired on the reserved channels.

C. A Broad Interpretation of "Editorial Control" Would Not Serve Any Identifiable Regulatory Purpose of Significance to Justify Even the Incidental Burdens It Would Impose on DBS Providers.

DBS providers have a First Amendment right to free speech. *See Time Warner Entertainment, Co. v. FCC*, 93 F.3d 957, 974-75 (D.C. Cir. 1996). "[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures." *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The sole purpose of Section 25(b) is to ensure that some minimal amount of noncommercial programming will be available on DBS systems. The section achieves this purpose by requiring DBS providers to reserve 4-7 percent of their channel capacity for such programs and by prohibiting DBS providers from editing or censoring the programs aired on the reserved channels. The broader definition of "editorial control" advanced by others -- that the DBS provider may not select the programs to be aired on the reserved channels -- would not serve any identifiable regulatory purpose of significance or any market-balancing interest. Indeed, there is no reason to conclude that the editorial prohibition was designed to quell anticompetitive practices of DBS providers. In the absence of any evidence identifying a valid regulatory purpose or some other legitimate government interest to be advanced by further restricting the journalistic freedom of DBS providers, there is no justification for the additional burdens occasioned by a broad definition of "editorial control." Accordingly, the Commission should adopt a definition of "editorial control" to mean only that the DBS provider may not edit or censor programming provided pursuant to Section 25(b), but does not limit the DBS provider's right to select the programs to be aired on the reserved channels.

III. THE MEANING OF "CHANNEL CAPACITY" IN SECTION 25(b).

With respect to the total "channel capacity" of a DBS provider as the term is used in Section 25(b), the Commission should adopt a definition of the term that affords DBS providers both certainty and flexibility. The obligation to provide noncommercial programming should be set at 4 percent of the DBS provider's total "channel capacity." "Channel capacity" should be defined as the DBS provider's total available "video channels offered to the public" and should be calculated on an annual basis. "Video channels offered to the public" should not include (1) system channels containing instructions or which are necessary to separate or administer DBS service; (2) barker channels; (3) channels containing static video; (4) audio-only channels; (5) channel guides; nor (6) business-only channels. Under this framework for determining a DBS provider's quantitative obligations under Section 25(b), the DBS provider will know on a date certain the number of channels that it must devote to noncommercial programming for the coming year. This will enable the DBS provider to properly and effectively plan for and allocate resources for the development of noncommercial programming in satisfaction of its public service obligations under Section 25(b).

In addition, the definition of total "channel capacity" advanced here -- "video channels offered to the public" -- will accommodate future advances in compression technology. "Compression technology refers to the ability to compress sufficient information to display multiple video programs into the spectrum currently allotted for one channel." *Notice of Proposed Rule Making*, 8 FCC Rcd 1589, 1596 (1993) (DBS public service obligations proceeding). Therefore, the number of deliverable channels on any one allotted channel will vary depending on the type of program material being presented. Under the current state of compression technology, a DBS provider can deliver between four and eight channels of video service on one allotted channel. That number is expected to increase in the future. Further, the public interest will be best served by using this "sliding scale" formula because future advances in compression technology will likely increase the channel capacity of one allotted channel which, in turn, will increase the DBS provider's total "channel capacity." However, regardless of the future channel capacity of any one allotted channel, only the DBS provider should determine which of the channels are "deliverable." The maximum number of channels that *may* be delivered on any one allotted channel is not necessarily the same as the number of channels that can be delivered with good picture quality. The DBS provider is in the best position to make this determination and to otherwise make the most efficient use of its allotted channels.

Finally, the Commission should place the requirement on small DBS providers, those with less than 50 channels, at a maximum of 2 channels. The second channel would not become operational until the provider has 44 operational channels. Moreover, where a particular provider's limited (less than 11 frequencies) channel assignments are split between more than one orbital location in the east (*i.e.*, 61.5, 101, 110 and 119) or in the west (*i.e.*, 148, 157, 166 and 175), the obligation shall be applicable to the whole and may be met at any of the eastern or the western locations. This will minimize market disruptions for the small provider and encourage technological innovation.

IV. CONCLUSION.

In conclusion, in order to further the primary purpose of the 1992 Cable Act to encourage the development of robust competition in the multichannel video programming marketplace which will best serve the public, the Commission should not adopt a definition of "editorial control" that would prevent DBS providers from selecting, in their discretion, the noncommercial programming sources. Indeed, the only definition of "editorial control" that would be consistent with the pro-competitive purpose of the 1992 Cable Act and the sole and limited purpose of Section 25(b) is one that defines the editorial prohibition to mean the DBS provider may not edit or censor noncommercial programs aired pursuant to that section. Further, no valid regulatory purpose exists to justify a broader interpretation of the term "editorial control." Finally, the obligation to provide noncommercial programming should be set at 4 percent of the DBS provider's total

available "video channels offered to the public." Small DBS providers with less than 50 channels are in a more difficult competitive position and, therefore, should provide a maximum of 2 channels with the second channel not becoming operational until the provider has 44 operational channels.

Respectfully submitted,

UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

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